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ALEXANDER L. STEVAS,
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No. 82-94

IN THE

Supreme Court of the United States

October Term, 1982

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF LOCAL 282, I.B.T.

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v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF LOCAL 282, I.B.T.

I. The Board found that Local 282's shop steward, Robert Worhacz:

1. falsified shape records, thereby causing the discharge of Kuebler and Curd (App. A at 68-69, 71-72, 164),

2. failed and refused to refer Kuebler and Curd to work assignments (App. A at 69-70, 84-89, 90-91, 102, 163-165),

3. threatened Kuebler and Curd (App. A 72-73, 91-92, 102, 163), and

4. filed false intraunion charges

against Kuebler, Curd and two others (App. A 145-147, 166-167).

The core feature of those findings and the decisions below is that Worhacz's conduct is attributable per se to Local 282 because he was the unit employees shop steward. The agency issue presented by this petition remains the same whether it be addressed directly to causation for Kuebler and Curd's discharge, the falsification of shape records, refusing to refer them to work assignments, threatening them or filing intraunion charges against them. This petition contests the Board's application of the respondeat superior principle to the facts herein.

On October 21, 1977 Willets sent the same discharge letter to five (5) bargaining unit employees, including Kuebler and Curd. The proximate cause for all their discharges was the failure to shape the Willets' job daily (App.

C at 1). Worhacz's first notice of these letters, and the discharges resulting therefrom, came from Kuebler on October 24. Worhacz questioned the sender and was told that Willets was operating ten (10) trucks and was cutting its seniority list to ten (10) drivers.

The Board argues that Willets' shape records were misleading and caused the Kuebler and Curd terminations. The argument is specious. Shape records could not have misled Willets. Kuebler and Curd, admittedly, did not shape daily and the ALJ found that the failure to do so subjected them to removal from the seniority list (App. A at 22).

II. The Board argues that this is not a motive case and that Willets' motive in discharging the five (5) unit employees is not an issue herein. The Board has, thus, misread the decision of this Court in Mt. Healthy City Board

of Education v. Doyle, 429 U.S. 274 (1977). For purposes of a Section 8(b)(2) violation two elements are required. "First," the union's conduct must have caused the discharges. "Second", the employer's participation would have to be a violation of Section 8(a)(3). If either, or both, of these elements is not proven by General Counsel there cannot be a violation of Section 8(b)(2). Since the Board has concluded that Local 282 attempted to cause the discharges of Kuebler and Curd, the Board's 8(b)(2) finding must also be supported by record evidence sufficient to prove, by a preponderance of the evidence, that Willets' would not have discharged Kuebler and Curd "but for" their protected activity.

The Mt. Healthy "causation test" is applicable herein despite the General Counsel's dismissal of the charge against Willets. The test is whether Kuebler

and Curd would have been discharged by Willets "but for" their union activity. This Court has said "[i]t is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test" whether the statute has been violated. Local 357 I.B.T. v. NLRB, 365 U.S. 667, 675 (1961). Unit employees are not entitled to immunity from termination merely because of their union activism. Clearly, the Board should not have found a violation of Section 8(b)(2) without a showing, by a preponderance of the evidence, that Willets would not have terminated Kuebler and Curd "but for" their protected union activity. No violation exists if Willets would have made the same decision to discharge them despite any causation conduct attributed to Local 282. The evidence is that Willets reduced its seniority list to the number

of trucks that it was operating and removed from its list that group of five (5) drivers that were not shaping daily.

III. The Board argues that Local 282 did not argue before it that Worhacz was not its agent. Again, the Board is in error. This same argument was raised by the Board before the court below. Local 282 brought to that panel's attention its exceptions to the ALJ's Decision. [App. C at 2-6]. Local 282 stated to the Board that Worhacz was not within the scope of his authority, as shop steward, when engaged in the unlawful conduct attributed to him.

Local 282 did not consent to a trial of the unlawful discharge issue. General Counsel only sought to prove that Kuebler and Curd's grievance was not processed through the arbitration procedure because they had filed an unfair labor practice charge with the

Board. General Counsel did not plead, prove or brief unlawful discharge and Local 282 was, therefore, not accorded the due process required by the Administrative Procedure Act, 5 U.S.C. 554 and the Board's Rules and Regulations, 29 C.F.R. Section 102.15 on that subject.

Although the court in NLRB v. Solboro Knitting Mills, Inc., 572 F. 2d 936, 944 (2d Cir.), cert. denied, 439 U.S. 864 (1978) was not overly concerned with the General Counsel's failure to allege, argue, and brief an 8(a)(5) finding by the Board, it reasoned that the Board's bargaining order remedy would have remained the same with or without the finding of a Section 8(a)(5) violation. Here, on the contrary, the Board's Order requires affirmative action by Local 282. This includes, but is not limited to, compensating Kuebler and Curd for all days:

1. between July 25 and October 21, 1977, on which their seniority would have entitled them to be assigned to work, whether or not they shaped or shaped late on those days, with interest (emphasis added).

2. they would have worked for Willets between October 21, 1977 and the date of their reinstatement or until such time as they have found substantially equivalent positions elsewhere if Willets refuses to reinstate them. 1/

1/ Local 282, in accordance with the Board's Order, requested Willets to immediately and fully reinstate Kuebler and Curd to their former jobs. Willets refused and Local 282 moved to compel arbitration of this reinstatement dispute, in accordance with the arbitration provision of their labor agreement. Willets opposed Local 282's motion, and also, petitioned the Board for a modification of its Decision and Order to prevent Local 282 from bringing this dispute to arbitration, because Local 282 would thereby be "attempting to avoid the liability imposed on it by the Board." On November 5, 1981, the Board denied Willets' motion "as lacking in merit" [App. C at 7 - 10]. However, on January 19, 1982, Local 282's motion to compel arbitration, was denied by the Hon. John S. Lockman of the Supreme Court of the State of New York, County of Nassau. That Order is on appeal to the Appellate Division of the Supreme Court of the State of New York, Second Department.

The Board's assessment of liability against Local 282 is punitive rather than compensatory. The relevant inquiry is whether protected activity was a "motivating factor" in Willets' decision to terminate Kuebler and Curd. Enforcement of the Board's Order without evidence of protected conduct being a "motivating factor" in Willets' decision to discharge Kuebler and Curd would place them in a better position by having engaged in protected activity than had they not. This would be contrary to this Court's rule of causation enunciated in its Mt. Healthy test.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

J. Warren Mangan
(Counsel of Record)
O'CONNOR & MANGAN, P.C.
29-27 41st Avenue
Long Island City, N.Y.
(212) 361-7950

Attorneys for Petitioner

October 8, 1982

Oct. 21, 1977

Mr. John Kuebler
223 Sullivan Ave.
Farmingdale, N.Y., 11735

Dear Mr. Kuebler:

A review of the Company records indicates that you have worked only three days in the past five months. These absences were caused in large measure by your failure to physically shape your job each day.

You are reminded that all employees are required to physically shape their jobs each day. Your omissions necessitate our terminating your employment with us as of this date.

Very truly yours,

WILLETS POINT CONTRACTING CORP.

Paul Tully
Superintendent
Maintenance Div.

PT:pb

cc: M. Carbone-Local 282

March 11, 1982

Hon. Justices Cardamone,Timbers & Newman
c/o A. Daniel Fusaro, Clerk
U. S. Court of Appeals
Second Circuit, U. S. Courthouse
Foley Square, New York 10007

Re: NLRB v. Local 282 I.B.T.
and Frank Mascali Construction et al
Docket No. 81-4166

Dear Judge Cardamone:

At oral argument of this appeal Judge Cardamone asked the undersigned whether Local 282 had ever raised its contention that Robert Worhacz was not an agent of the Union when he was engaged in recordkeeping for Willets Point Contracting Cop., before the Board. My initial response was in the negative and corrected thereafter. Unfortunately, I failed to respond to the Board's argument that the "Union never raised this contention before the Board" in Local 282's reply brief.*

In order to satisfy any doubt on this subject I have incorporated within this letter those portions of Local 282's Exceptions to the Administrative Law Judge's decision and supporting Brief which refer to this subject.**

*See pages 47-48

**I have chosen this method as opposed to a submission of the Exceptions because they are on 8½ by 14 stationary.

I. EXCEPTIONS:

"25. [J.D. 24, lines 21-34]. The ALJ erred in concluding that Worhacz, exclusively, took over the Willets Point recordkeeping function after Richard Moore's employment terminated. The record evidence is that his work was done jointly by the person dispatching the drivers and Worhacz. After Moore's departure the dispatching was handled by Paul Tully and then Frank Daley. There is no basis at all for the ALJ's conclusion that Willets Point "delegated the power to... make assignments of work to the Union shaop steward on the job." Assuming, arguendo, that such an assignment was made to Worhacz, there is no basis for the ALJ's conclusion that Worhacz was acting within the scope of his authority, as Local 282's shop steward, while performing these functions.

28. [J.D. 25, lines 20-23 and J.D. 26, lines 1-7]. The ALJ erred in crediting Kubler and Curd's account of what they allege occurred on July 18, 1977 and not crediting Worhacz's denial. Furthermore, assuming that Worhacz made the statement attributed to him, there is no basis for concluding that he conduct came within the scope of his authority as shop steward."

II. BRIEF:

Page 53, Paragraph 2 reads as follows:

"The ALJ found that Willets 'delegated total responsibility for the maintenance of shape records to [Worhacz].' These records were maintained by Moore,

alone, prior to 1976 and thereafter by Worhacz and the Willets' dispatcher, jointly. Whether these records were 100% accurate or not cannot be either credited to or be the cause for any censure of Local 282. Any participation of Worhacz in the preparation or maintenance of these records was not at the behest of Local 282 and, while engaged in this work, he was not acting as a representative of Local 282."

I hope that the foregoing resolves the issue raised by the Board in its Brief.

Very truly yours,

J. Warren Mangan

JWM:av
cc: Sandra Elligers, attorney
National Labor Relations Board

Howard Mattson, Esq.
General Contractors Association

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FRANK MASCALI CONSTRUCTION
G.C.P. CO.: FRANK MASCALI
CONSTRUCTION CO., INC.

and Case 29-CA-5975

JOHN KUEBLER, an Individual

LOCAL 282, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA
(Frank Mascali Construction
G.C.P. Co.; Frank Mascali
Construction Co., Inc.)

and Case 29-CB-3075

JOHN KUEBLER, an Individual

LOCAL 282, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA
(Willets Point Contracting
Corp.)

and Case 29-CB-3115

CHARLES CURD, an Individual

LOCAL 282, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA
(Allied Used Truck
Exchange, Inc.)

and Case 29-CB-3235

CHARLES CURD, an Individual

ORDER DENYING MOTION

On August 15, 1980, the National Labor Relations Board issued a Decision and Order[1/] in the above-entitled proceeding, finding that Respondent Employers and Respondent Union had engaged in and were engaging in unfair labor practices within the meaning of Section 8(a)(1)and (3) and Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended, and ordering that they cease and desist therefrom and take certain affirmative action.

Thereafter, on September 2, 1981, Party-in-Interest Willets Point Contracting Corp. filed a Motion to Reconsider submitting, inter alia, that the Board's Decision and Order imposed liability on Respondent Union for backpay due the

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1/ 251 NLRB 219 (1980).

Charing Parties, that Respondent Union has filed an action in the Supreme Court of the State of New York which seeks to compel Willets Point to arbitrate whether it wrongfully discharged the Charging Parties and is liable to them for backpay, and that Respondent Union is thereby attempting to shift its liability to Willets Point. It therefore moves the Board to modify its Decision and Order to prevent Respondent Union from attempting to avoid the liability imposed on it by the Board. On September 15, 1981, counsel for the General Counsel filed a response to the motion to reconsider.

The Board having duly considered the matter,

IT IS HEREBY ORDERED that Willets Point Contracting Corp.'s Motion to Reconsider be, and it hereby is, denied as lacking in merit.

Dated, Washington, D. C., November 5,1981.

By direction of the Board:

Enid W. Weber
Associate Executive Secy.

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